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No. 90-5721

In the Supreme Court of the United States

OCTOBER TERM, 1990

PERVIS TYRONE PAYNE, PETITIONER

v.

STATE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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33 pp

QUESTIONS PRESENTED

1. Whether the use of victim impact evidence during the sentencing phase of petitioner's capital trial violated petitioner's rights under the Eighth Amendment.

2. Whether *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), should be overruled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

In recent years, the United States has joined the States in seeking to make the criminal justice system more responsive and accountable to the victims of crime. As part of the effort to "enhance and protect the necessary role of crime victims * * * in the criminal justice process," Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1248-1249, Congress has mandated that the presentence report prepared after conviction for a federal crime contain "information concerning any harm, including financial, social, psychological, and physical harm done to or loss suffered by any victim of the offense." *Id.* § 3, 96 Stat. 1249.[1] The Attorney General has promulgated guidelines

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[1] In keeping with this direction, Fed. R. Crim. P. 32(c)(2)(D) now requires a presentence report to include "verified information

to carry out that Act's policies; those guidelines direct, *inter alia*, that "federal prosecutors should advocate the interests of victims at the time of sentencing." Department of Justice, *Guidelines for Victim and Witness Assistance*, 48 Fed. Reg. 33,777 (1983). The Sentencing Guidelines developed pursuant to the Sentencing Reform Act of 1984 also mandate consideration of the harm resulting from the defendant's conduct. Various Guidelines provide for increased sentences based on the vulnerability or status of the victim and the physical or psychological harm resulting from the crime. See Sentencing Guidelines §§ 2A2.1(b)(1), 2A2.2(b)(3), 2A3.1(b)(4), 2A4.1(b)(2), 2B3.2(b)(3), 2H1.3, 3A1.1, 3A1.2, 5K2.2, 5K2.3; see also 18 U.S.C. 3553(b).

The strong federal interest in permitting consideration of the harm inflicted on victims of crime is also reflected in provisions applicable to capital sentencing. For example, Fed. R. Crim. P. 32(c)(2) applies in full to prosecutions under the capital sentencing provisions of the Air Piracy Act, 49 U.S.C. App. 1472-1473. The death penalty provisions of the Anti-Drug Abuse Amendments Act of 1988 permit the sentencer to find an aggravating circumstance where "[t]he victim was particularly vulnerable due to old age, youth, or infirmity," 21 U.S.C. 848(n)(9), and also authorize any other factor aggravating the crime—including its impact on victims—to be presented to the sentencer upon notice to the defendant, 21 U.S.C. 848(h)(1)(B) and 848(n).[2] The Court's resolution of this case may directly affect the validity of those provisions of federal law, and it will certainly affect the future development of federal law concerning the use of victim impact evidence at a capital sentencing hearing.[3]

stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed."

[2] The use of victim impact evidence has also been at issue in a capital proceeding under the Uniform Code of Military Justice. *United States* v. *Murphy*, 30 M.J. 1040 (A.C.M.R. 1990).

STATEMENT

1. Petitioner was found guilty on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years' imprisonment for the assault. J.A. 25.

The victims were Charisse Christopher, her two year old daughter Lacie, and her three year old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from petitioner's girlfriend. The State's evidence showed that, after injecting cocaine and drinking beer, petitioner entered the victims' apartment and made sexual advances toward Charisse. When he was rebuffed, petitioner repeatedly stabbed Charisse and both children with a butcher knife.

The police responded to a report by a neighbor who heard screams from the apartment. When the first officer arrived at the apartment building, he encountered petitioner, covered with blood, leaving the building. Petitioner struck the officer with an overnight bag and fled, but he was apprehended shortly thereafter. Inside the apartment, the police found blood on the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Charisse and

[3] Recent legislative efforts demonstrate a continuing interest in the use of victim impact evidence in capital sentencing. For example, the President's crime bill recently introduced in Congress includes as statutory aggravating factors in capital cases the victim's vulnerability "due to old age, youth, or infirmity" and the victim's employment in certain official capacities. S. 635, 102d Cong., 1st Sess. § 101 (1991). The bill would also allow the government, upon notice to the defendant, to introduce evidence regarding nonstatutory aggravating circumstances, including "the effect of the offense on the victim and the victim's family." *Ibid.* See generally 137 Cong. Rec. S3195-S3198, S3214-S3219 (daily ed. Mar. 13, 1991).

Lacie were dead from their wounds. Nicholas, although very seriously injured, was conscious, and he survived. A number of circumstances—including the state of the apartment, the screams, and the fact that Charisse was stabbed 41 times and sustained 42 defensive wounds on her arms and hands—indicated that she succumbed only after an intense and protracted struggle. See J.A. 25-30.

At trial, petitioner testified that he had not harmed any of the Christophers; that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived; and that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he had tried to help the victims. J.A. 27, 30-34.

2. The jury returned guilty verdicts against petitioner on all counts. During the sentencing phase of the trial, the State called Charisse's mother, Mary Zvolanek. Asked how Nicholas had been affected by the murders of his mother and sister, Ms. Zvolanek testified (J.A. 3):

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

The State also showed a videotape, taken on the afternoon of the murders, of the apartment and the bodies of Charisse and Lacie. J.A. 37-38, 43-44.

Petitioner called four witnesses during the sentencing phase of the trial: a psychologist, his girlfriend, and his mother and father. The psychologist testified about the results of tests he administered—in particular, that petitioner had scored 78 on an I.Q. test, a result the psychologist described as "significant." J.A. 38-39. The latter three witnesses all testified that petitioner attended church, that they had not known him to use drugs or abuse alcohol, and that the offenses of which he had been convicted were inconsistent with what they

knew of him. 18 Tr. 1509-1510, 1558, 1559, 1565. Petitioner's girlfriend also testified that she had met petitioner during a period when she was being abused by her husband. She stated that petitioner was "very caring for" her three children, who were being affected by her marital difficulties, and that he had "got them back to their old self." *Id.* at 1508-1509. The children, the girlfriend also testified, had come to "love [petitioner] very much," and he behaved "[j]ust like a father that loved his kids." *Id.* at 1511. She described the children as "shocked" by the charges against petitioner, and she reported that they "believe he's innocent and * * * ask about him all the time." *Ibid.* Petitioner's mother and father described petitioner's background, and they testified that he had been a good son and that they loved him. *Id.* at 1565, 1570.

In arguing for the death penalty during closing argument, the State urged the jury to consider the continuing effects of Nicholas's experience and the other harm flowing from the murders. For instance, during rebuttal argument, the prosecutor stated (J.A. 13, 14, 15-16):

> You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. * * *
>
> [Petitioner's counsel] talks about Pervis Payne and how well thought of he was in high school and how many people like him and love him. No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no, there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. * * *

> [Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why is it especially cruel, heinous, and atrocious, the burden that that child will carry forever.

The jury sentenced petitioner to death on each of the murder counts.

3. The Supreme Court of Tennessee affirmed petitioner's conviction and sentence. J.A. 25-47. The court rejected petitioner's contention that the admission of Ms. Zvolanek's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989). The court characterized the grandmother's testimony as "technically irrelevant," but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt." J.A. 40.

The court determined that the State's argument was "relevant to [petitioner's] personal responsibility and moral guilt." J.A. 42. "When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room," the court explained, "the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.'" J.A. 42. The court added that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." J.A. 42. Even if the argument violated *Booth* and *Gathers*, the court continued, the error was harmless beyond a reasonable doubt. J.A. 43.

SUMMARY OF ARGUMENT

1. This Court's decisions in *Booth* and *Gathers* are grounded in the proposition that evidence of the full extent of the harm caused by a murderer "is irrelevant to a capital sentencing decision" and "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 503. Neither of these grounds justifies a constitutional rule excluding all evidence of the harm caused by a murder, including the characteristics of the person whose life was taken and the impact of the crime on family members.

a. *Booth*'s ruling that a sentencer may not take account of the harm resulting from an offense contradicts both longstanding principles of criminal responsibility and the judgment reflected in legislation enacted by Congress and virtually all of the States. The Constitution does not prohibit the implementation of that judgment in the context of capital sentencing. This Court has made clear that an offender may be subjected to the death penalty even in the absence of proof that he intended to cause the victim's death. The Eighth Amendment cannot fairly be construed, therefore, to forbid consideration of the unintended consequences of criminal activity. The extent of the harm resulting from an offense is relevant to a constitutionally permissible sentencing consideration—the degree of retribution warranted by the offense. Consideration of a particular murder's effects does not undercut the procedural requirements that this Court has prescribed for capital sentencing.

b. The fact that victim impact evidence may have different degrees of probative value in different cases or may on occasion be unduly inflammatory does not justify a constitutional rule excluding all victim impact evidence from capital sentencing proceedings. If evidence in a particular case is lacking in probative value, inflammatory, or otherwise unfairly prejudicial, the trial court can and should exclude it. A jury can be instructed as to those considerations that may not enter its decision to impose the death penalty. If victim impact evidence is improperly admitted, its admission can be fully and carefully reviewed on appeal. These are familiar tasks that trial and appellate courts are well-equipped to perform. The possibility that some evidence offered to show the effects of a murder should be excluded is scarcely a reason for erecting a constitutional rule barring all such evidence.

c. Finally, *Booth*'s rigid rule is in severe tension with the principle that a sentencer cannot be precluded from considering any aspect of the defendant's character or record that may provide a basis for imposing a sentence other than death. If the jury must consider the defendant as a "uniquely individual human being[]," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion), then there is no convincing reason—and especially none grounded in the Constitution—to prevent the jury from also considering the unique characteristics or circumstances of the victim.

2. Principles of *stare decisis* do not preclude reexamination of *Booth* and *Gathers*. The Court's willingness to reconsider its prior decisions is, quite appropriately, greater in constitutional than in statutory cases, for in that setting there is no method of correcting errors short of constitutional amendment. Moreover, the Court has expressly stated that a prior decision is more likely to be overruled if it has bred confusion or anomalous results, or if it disserves principles of democratic self-governance. Both of these factors weigh heavily in favor of abandoning *Booth* and *Gathers*.

3. The evidence and argument at issue in this case did not violate any of petitioner's rights under the Eighth Amendment. Nicholas's grandmother's testimony was a simple, factual description of the continuing effects of petitioner's offenses on Nicholas. The State's argument concerning the effects of petitioner's offenses did not suggest that the death penalty should be imposed on the basis of any impermissible consideration, and in light of the evidence and argument presented on petitioner's behalf, the State's argument did not create an unacceptable risk of an unreliable sentencing determination.

ARGUMENT

I. THE EIGHTH AMENDMENT DOES NOT PROHIBIT THE ADMISSION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING PHASE OF A CAPITAL TRIAL

In *Booth* v. *Maryland*, 482 U.S. 496 (1987), this Court held that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital murder trial. Two years later, in *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), the Court applied that rule and held that it was error for the prosecutor to comment to the sentencing jury on the personal qualities of the victim. In both cases, the Court made it clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10; *Gathers*, 490 U.S. at 811.

Two complementary justifications were offered to support the rule announced in *Booth* and applied in *Gathers*. The first is that evidence of a murder victim's characteristics and the impact of the murder on others are, as a matter of constitutional law, "irrelevant to a capital

sentencing decision." *Booth*, 482 U.S. at 503. Evidence offered to support a death sentence must have "some bearing on the defendant's 'personal responsibility and moral guilt,'" *Booth* stated, and victim impact evidence fails that test to the extent it presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 502, 505; see *Gathers*, 490 U.S. at 810-811. Second, the Court held that even victim impact information of which a murderer was aware when he committed his offense may not be admitted because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." 482 U.S. at 505. In our view, neither justification is valid.

A. The criminal law has long embraced the principle that a defendant may be held personally responsible for the harm caused by his criminal activity, and that he may be punished even for the unintended consequences of that conduct. *Booth*, 482 U.S. at 516 (opinion of White, J.); *id.* at 519 (opinion of Scalia, J.); *Gathers*, 490 U.S. at 818-819 (opinion of O'Connor, J.); *id.* at 823-824 (opinion of Scalia, J.).[4] The extent of the harm caused by an offense has historically influenced the choice of a particular sentence from within the range authorized by statute. The Sentencing Guidelines codify that practice in several respects. For various offenses (including assault, sexual abuse, kidnapping, extortion, and civil rights violations), the offense level is increased "[i]f the victim sustained bodily injury," and the extent of the increase is tied to the severity of the injury. Sentencing Guidelines §§ 2A2.1(b)(1), 2A2.2(b)(3), 2A3.1(b)(4), 2A4.1(b)(2), 2B3.2(b)(3), 2H1.3.

[4] See generally Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497, 1498 (1974) ("The criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked.").

In addition, the Guidelines authorize upward departures for physical or extreme psychological injury resulting from other offenses. *Id.* at §§ 5K2.2, 5K2.3. Nothing in any of these Guidelines requires that the injury have been intended or foreseen.

In recent years, the federal government and virtually all the States have enacted legislation designed to place information about the harm caused by crimes before their sentencing authorities. As required by the Victim and Witness Protection Act of 1982, presentence reports prepared in accordance with Fed. R. Crim. P. 32(c)(2)(D) now include "verified information stated in a non-argumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." Many state statutes provide for comparable victim impact statements or confer a right of allocution on the victims of crimes.[5] The goal of these provisions is to ensure that sentencing authorities are provided with information enabling them to design a sentence that takes account of the harm a defendant has caused.[6]

[5] See National Organization for Victims, *Victims Rights and Services: A Legislative Directory* 35, 39, 43 (1988). Victim impact legislation is consistent with recommendations of the ABA and the President's Task Force on Victims of Crime. ABA, *Guidelines for the Fair Treatment of Victims and Witnesses in the Criminal Justice System* (1983) ("[p]rior to the sentencing of an offender in a serious case, victims or their representatives should have the opportunity to inform the sentencing body of the crime's physical, psychological, and financial repercussions on the victim's family"); President's Task Force on Victims of Crime, *Final Report*, 33, 72, 76, 78 (1982).

[6] The results of one survey reflected that large majorities of both prosecutors and judges view the financial, physical, and psychological information provided in victim impact statements to be important and useful in sentencing. S. Hillenbrand & B. Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims* 44, 71 (May 1989) (unpublished

The Court in *Booth* took note of those statutes, observing that they "reflect[ed] a legislative judgment that the effect of crime on victims should have a place in the criminal justice system." 482 U.S. at 509 n.12.[7] *Booth* found that judgment impermissible in a capital case, however, on the ground that "death is a 'punishment different from all other sanctions,' * * * and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations." *Ibid.* While it is undoubtedly true that the death penalty is unique in its irrevocability and severity, see, *e.g.*, *California* v. *Ramos*, 463 U.S. 992, 999 & n.9 (1983), those qualities do not justify placing a widely accepted and legitimate sentencing concern beyond the power of the States and Congress.

1. By its terms, the Eighth Amendment prohibits "cruel and unusual punishments." Nothing in that language or the amendment's history suggests that evidence of the harm caused by the defendant is irrelevant to the sentencing decision, whether in capital cases or otherwise. In upholding the death penalty's application to certain categories of felony murder, the Court has held that a defendant who acts with reckless disregard for human life may be subject to the death penalty if he participates in a robbery that results in death. But, in the Court's view, the Constitution would not permit imposition of the death penalty on the same defendant, acting in exactly the same way, with equal recklessness as to human life, if the robbery in which he participated

study conducted by the ABA Criminal Justice Section Victim Witness Project).

[7] In defining the scope of the Eighth Amendment's prohibition on cruel and unusual punishments, the Court has examined the historical treatment of the matter in question and comparable legislative judgments. See, *e.g.*, *Stanford* v. *Kentucky*, 109 S. Ct. 2969 (1989). No attempt has been made to justify *Booth* and *Gathers* on that basis.

did not result in the death of one of the victims. *Tison* v. *Arizona*, 481 U.S. 137, 148 (1987).[8]

In many other settings as well, it is clear that the impact on the victim determines whether the act may lead to a sentence of death. For example, even though the death penalty may not be imposed for the rape of an adult woman, see *Coker* v. *Georgia*, 433 U.S. 584 (1977), the case is dramatically changed if the victim dies as a result of injuries suffered during the rape. In that event, even if the defendant did not specifically intend to kill the victim, the defendant would be subject in most jurisdictions to prosecution for felony murder and, in light of *Tison*'s analysis, could constitutionally be sentenced to death. "[P]roportionality—at least as regards capital punishment— * * * involves the notion that the magnitude of the punishment must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." *Enmund* v. *Florida*, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting).

Since that is so, it is difficult to understand why the Constitution should be construed to prohibit a jury or

[8] In *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982), the Court held that the death penalty could not constitutionally be imposed upon a defendant who, although a participant in a robbery in which two persons were killed, did not himself kill or attempt to kill and did not have any intention of participating in or facilitating the murders. The Court stated that a defendant's "criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." In our view, *Gathers* erred in its suggestion that the Court thereby recognized a limit on the factors that may be considered in determining whether to impose a death sentence on an offender who is constitutionally eligible for that penalty. See 490 U.S. at 810. Based upon a review of state statutes, jury verdicts, and other factors, *Enmund* defined a level of attributed responsibility for a homicide as to which the death penalty was held to be constitutionally disproportionate. *Enmund* did not, however, purport to address what factors may be made relevant to the imposition of a death sentence on an offender who was directly and personally responsible for taking a life.

a judge in a capital case from considering the nature of the life that a murder has cut short or the effects of the crime on the survivors. Legislative bodies can reasonably conclude—with the most powerful moral justification—that the lives ended by murder are more than just abstractions and that survivors and loved ones are themselves very much "victims" of the crime of murder.[9] The reality of this point is underscored in case after case coming before this Court. Indeed, the present case demonstrates the profound anguish visited on a three-year-old child—the victim himself of a vicious assault—by the brutal murder of his mother and his two-year-old sister before his own eyes.

2. The Court has generally refused to constitutionalize the factors that a sentencer may consider in capital cases. "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." *California* v. *Ramos*, 463 U.S. at 999. As a matter of constitutional law, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, * * * the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Id.* at 1008.

This Court's consistent unwillingness—apart from *Booth* and *Gathers*—to constitutionalize the factors that the States or Congress may make relevant to the imposition of the death penalty is well founded. By its terms, the Eighth Amendment does not speak to the substantive

[9] The *Guidelines for Victim and Witness Assistance* promulgated by the Department of Justice provide that "[t]he term 'victim' also includes the immediate family of a minor or a homicide victim." 48 Fed. Reg. 33,775 (1983).

criteria that States or the federal government may employ to determine an appropriate punishment. Moreover, "[t]he deference [owed] to the decisions of the state legislatures under our federal system * * * is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg* v. *Georgia*, 428 U.S. 153, 176 (1976) (plurality opinion); *California* v. *Ramos*, 463 U.S. at 1000.[10] Criminal sentences have traditionally rested on a wide variety of factors. Unlike determinations of guilt, in which "the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt" (*id.* at 1008), "sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances," *Zant* v. *Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in the judgment).

Victim impact evidence may bear directly on the question whether, in a particular case, the death penalty is appropriate for purposes of retribution. Retribution is a recognized and legitimate purpose served by capital punishment. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia*, 428 U.S. at 184. See *Spaziano* v. *Florida*, 468 U.S. 447, 461 (1984). In assessing the extent to which a capital offense is an affront to humanity deserving of the death penalty, *i.e.*, the extent to which the retributive purpose is served, the sentencer may reasonably take into account the full extent of the harm flowing from that particular offense.

[10] See also *Skipper* v. *South Carolina*, 476 U.S. 1, 11 (1986) (Powell, J., concurring in the judgment) ("[T]he States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance."). The same principle applies to evidence admitted to show the aggravated nature of an offense.

The characteristics of the victim and the harm to survivors are not—like race or religion—considerations that the Constitution declares irrelevant to sentencing. In our view, for instance, nothing in the Constitution would prohibit a State from authorizing enhanced punishment for the murder of a parent of minor children—whether or not the offender was aware of the victim's status—because of the profound harm to children occasioned by that offense.[11] The harm resulting from a particular murder of that type is not, therefore, "constitutionally impermissible or totally irrelevant to the sentencing process," *Zant* v. *Stephens*, 462 U.S. at 885. If the State may constitutionally prescribe enhanced punishment, including capital punishment, based on a status such as parenthood, the State should be equally free to admit evidence of the victim's family status and the impact of the murder on family members as factors bearing on the propriety of the death penalty.

3. Contrary to *Booth*'s suggestion, the procedural requirements the Court has imposed on capital sentencing systems provide no support whatever for a rule barring victim impact evidence. Under the Court's decisions, "[a] State must 'narrow the class of murderers subject to capital punishment,' * * * by providing 'specific and detailed guidance' to the sentencer." *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987). Allowing a sentencer to consider victim impact evidence, however, in no way dilutes the specificity of the criteria that a State has selected to

[11] Indeed, this Court has already recognized that the victim's status can properly be considered in some settings as a factor weighing in favor of imposing the death penalty. See *Roberts* v. *Louisiana*, 431 U.S. 633, 636 (1977) (victim's status as a law enforcement officer may be considered as an aggravating factor). Federal statutes authorize the death penalty for the assassination of the President or Vice President, 18 U.S.C. 1751, 1111, a Member of Congress, a Cabinet officer, a Supreme Court Justice, or the head of an Executive Department, 18 U.S.C. 351, and a grand jury witness, 18 U.S.C. 1512.

distinguish offenders who are eligible for the death penalty from those who are not.[12]

Likewise, victim impact evidence is not at all inconsistent with the Court's requirement of individualized capital sentencing. See, *e.g.*, *Zant* v. *Stephens*, 462 U.S. at 879; *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982). To the contrary, admitting victim impact evidence potentially enhances the individualized nature of the sentencing decision by adding to the information, particular to the defendant's crime, that the jury may consider in determining whether to impose a death sentence.

If victim impact information is, as *Booth* and *Gathers* concluded, "irrelevant to a capital sentencing decision" and "wholly unrelated to the blameworthiness of a par-

[12] *Booth* erred in suggesting that a State may not allow a sentencer even to consider facts that would not, standing alone, qualify as statutory aggravating circumstances. See 482 U.S. at 506 (relying on *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980) (Stewart, J.), for the proposition that victim impact information does not provide "a principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not"). In *Godfrey*, the plurality determined that a statutory aggravating circumstance, which authorized the death penalty for certain vile or inhuman murders, was unconstitutionally overbroad and vague. That conclusion does not suggest that, if the jury had found another statutory aggravating circumstance making the defendant eligible for the death penalty, it would have been constitutionally required to ignore aspects of the murder that, although not themselves sufficient to justify the death penalty, weighed in favor of such a sentence. As the Court explained in *Zant* v. *Stephens*, 462 U.S. at 878:

> [S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

See also *Barclay* v. *Florida*, 463 U.S. 939, 950 (1983) (plurality opinion).

ticular defendant" (482 U.S. at 503, 504; 490 U.S. at 810), logic would suggest that each capital defendant is constitutionally entitled to a jury instruction admonishing the jury not to consider any information of that type that has come to its attention during the guilt stage of a trial and not to refer to its own understanding of the harm that has resulted from a murder. Yet it is unthinkable, we believe, that the Eighth Amendment could be construed to prohibit the jury that sentenced petitioner from even considering his crimes' traumatic impact on the three-year-old survivor of petitioner's assault, the opportunities that were taken from the young survivor's mother and sister, and the loss imposed on others affected by petitioner's crimes. See Pet. Br. 13 (conceding that argument on this point was permissible, but maintaining that evidence was not). The flaw is not in the logic, but in the premise. It is simply wrong, we submit, to say that victim impact information is necessarily irrelevant to a constitutional sentencing determination.

B. *Booth*'s second justification is that victim impact evidence, even if potentially relevant to the imposition of the death penalty, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 503; see *id.* at 505. This rationale suggests that even if the Constitution does not forbid the sentencer from considering harm to victims, evidence or prosecutorial comment on that issue is impermissible because it is too prejudicial to be allowed.

1. This reasoning is inconsistent with the fundamental principles that trial courts can determine the admissibility of evidence and that a properly instructed jury can be trusted to employ it for an appropriate purpose. As this Court explained in rejecting a contention that expert testimony on future dangerousness should be excluded from capital trials, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983).[13] The task of identifying what information will be placed before a jury is, within very broad limits, a matter for the States. Cf. *Skipper* v. *South Carolina*, 476 U.S. 1, 15 (1986) (Powell, J., concurring in the judgment) (since "[t]his Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer," "[i]t makes little sense * * * to substitute our judgment of relevance for that of state courts and legislatures").

These considerations have particular force with respect to sentencing.[14] In fact, in the area of capital sentencing, the plurality opinion in *Gregg* rejected an objection to "the wide scope of evidence and argument allowed at presentence hearings," saying (428 U.S. at 203-204):

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. * * * So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much

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[13] We do not suggest that information material to sentencing must comply with the rules of evidence, see *Williams* v. *New York*, 337 U.S. 241 (1949), as long as a capital defendant has a sufficient opportunity to deny or explain that information, see *Gardner* v. *Florida*, 430 U.S. 349 (1977).

[14] See *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) (in the federal system, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come"); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *Williams* v. *New York*, 337 U.S. 241, 246 (1949).

information before it as possible when it makes the sentencing decision.

2. *Booth* suggested that the special characteristics of victim impact evidence warrant a departure from these principles. In particular, *Booth* expressed concern that, if such evidence is admissible, the imposition of capital punishment might turn on the willingness and ability of the victim's relatives to sway the jury, and difficult-to-rebut overstatement regarding the deceased's character or the grief of survivors. 482 U.S. at 505-507. In our view, none of those concerns justifies a constitutionally based *per se* rule excluding victim impact evidence in capital sentencing proceedings.

It cannot be denied, as the Court noted in *Booth*, 482 U.S. at 505, that some family members are more articulate than others, and that some are more willing than others to express their grief to a jury. But such differences among witnesses are an inescapable feature of a criminal justice system in which the participants are individuals of widely differing backgrounds, abilities, and experiences. All witnesses, including witnesses for the defense, differ in their ability to present their testimony in an effective and persuasive manner, just as defense lawyers and prosecutors differ in their ability to present evidence and argument to the jury. There is nothing so distinctive about victim impact testimony as to raise these ordinary and unavoidable variations to the level of a constitutional infirmity, so as to require exclusion of an entire category of evidence that States or Congress have determined to be proper and appropriate.

Of course, a capital sentence decision may not be based on constitutionally impermissible factors such as the race of the victim. See *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). But the risk that juries may base their decisions on such impermissible factors is present regardless of whether victim impact evidence is admitted, and it is by no means clear that introduction of victim impact evi-

dence will have the effect of increasing that risk; indeed, it may have the opposite effect. The evidence may personalize the victim for the jurors and make it more likely that they will empathize with the family members of a victim with whom the jurors might otherwise feel that they have very little in common.

In any event, the trial court can control the presentation of the evidence to minimize the risk of its misuse. The court can instruct the jury not to allow impermissible considerations such as race to influence the exercise of its discretion. And if the risk of misuse in a particular case is too great, the court can simply exclude the evidence on that ground. But the risk that the jury might occasionally misuse particular evidence does not justify a categorical rule, grounded in the Constitution, that victim impact evidence may never be admitted at a capital sentencing hearing.

It is true, of course, that testimony by members of the victim's family can be highly charged; as a result, such evidence may, if presented in an improper manner or for improper purposes, create an unacceptable risk that a death sentence was imposed for arbitrary and capricious reasons. But that possibility does not justify what *Booth* created—a prophylactic, constitutionally based rule excluding all such evidence. Trial courts routinely exclude unduly inflammatory evidence. And—in an extreme case—if the admission of prejudicial matter has deprived the sentencing determination of the reliability that the Eighth Amendment requires, the defendant may be constitutionally entitled to vacation of his sentence on that ground. See *Darden* v. *Wainwright*, 477 U.S. 168, 178-179, 183-184 n.15 (1986); *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980) (procedures in sentence hearings must be designed to ensure that "death penalty is * * * imposed on the basis of 'reason rather than caprice or emotion' "). Nor is the promise of reliability in sentencing proceedings an empty one; this Court "has gone to extraordinary measures to ensure that the prisoner sen-

tenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). In view of those significant protections, claims that victim impact evidence is improper and unfairly prejudicial can appropriately be resolved in each individual case.

C. An outright prohibition on victim impact evidence is especially unwarranted in view of this Court's insistence on a rule of broad admissibility for defense evidence in capital sentencing proceedings. The Court has held that "the sentencer * * * [cannot] be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). See also *Skipper* v. *South Carolina*, 476 U.S. 1 (1986); *Eddings* v. *Oklahoma*, *supra*. When combined with the rule of *Booth* and *Gathers*, that principle creates an anomaly. The sentencer is required to consider the full range of facts about the defendant's character and circumstances, but may not be told anything of the character of the victim or the extent of the harm the defendant has inflicted upon others. In this case, for instance, petitioner relied upon testimony from his parents and his girlfriend that he had been a good son, was a caring person, and was loved and missed by the girlfriend's children, see pp. 4-5, *supra*. Yet, he maintains, it was error for the State to offer any evidence regarding the extent to which Nicholas suffered as a result of the loss of his mother and sister.

We can discern nothing in the Constitution that requires such a one-sided presentation. As Justice Cardozo wrote for the Court, "[J]ustice, though due to the accused, is due to the accuser also. * * * We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934). If a sentencing jury is to "express the conscience of the community on the ultimate question of life or death," *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968), there should be no constitutional prohibition against permitting the jury to have a complete picture of the act the defendant has committed and the lives it has profoundly affected.

II. PRINCIPLES OF *STARE DECISIS* DO NOT REQUIRE CONTINUED ADHERENCE TO *BOOTH* AND *GATHERS*

The doctrine of *stare decisis* serves important purposes in our legal system. The doctrine promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). But the Court has recognized that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). And it is well settled that *stare decisis* is less inflexible in constitutional cases than in statutory cases, because in the former cases "correction through legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). See also *Monell* v. *Department of Social Services*, 436 U.S. 658, 696 (1978).

Although the Court has not adopted a "rigid formula" for deciding when a prior construction of the Constitution should be overruled, *Vasquez*, 474 U.S. at 266, it has identified several factors that bear on that determination. One factor is whether the prior rule has bred confusion or led to anomalous results. *Solorio* v. *United States*, 483 U.S. 435, 448-450 (1987); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-78 (1938). Another is whether a prior decision, even one of fairly recent vintage, "disserves principles of democratic self-governance." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

Both of these factors, in our view, point strongly toward reconsideration of *Booth* and *Gathers*.

Without question, *Booth* has spawned confusion and uncertainty in the lower courts. See *Gathers*, 490 U.S. at 813 (O'Connor, J., dissenting) (citing cases); *Mills* v. *Maryland*, 486 U.S. 367, 395-398 (1988) (Rehnquist, C.J., dissenting). Although the *Booth* Court painted with a broad brush, questions linger as to whether *Booth* outlaws admission of *any* statements or evidence relating to the character of the victim or the impact of the crime, or whether *Booth*'s prohibition applies only to detailed victim impact statements of the type at issue in that case. *Booth* and *Gathers* also leave open the difficult issue whether and, if so, what victim characteristics remain legitimate subjects for consideration in sentencing. Although the Court has stated that certain victim characteristics, such as the victim's status as a police officer, may appropriately be made an aggravating circumstance, see *Roberts* v. *Louisiana*, *supra*, it remains unclear whether the victim's youth, age, or infirmity may be taken into account, see 21 U.S.C. 848(n)(9); whether the defendant must have been aware of those factors in order for them to be considered; or even whether the defendant must have acted with intent to exploit those characteristics.

We recognize the possibility that, over time, this Court could reduce the level of *Booth*-spawned uncertainty by deciding a series of cases limiting and defining *Booth*'s reach. But the hard fact remains that the principles informing *Booth*'s exclusionary approach have no natural limits; as a result, the process of fixing its reach will necessarily have an *ipse dixit* quality to it, rather than constituting a logical extrapolation from principles that the *Booth* majority laid down. For practical reasons, moreover, even a broad prohibition on victim impact evidence would be unlikely to lay this issue to rest. A jury necessarily becomes aware of some of the victim's characteristics during the guilt phase of the trial; the jury

is also cognizant, at least in a general sense, of the impact of a murder on family members of the victim. Unless juries are to be instructed not to take account of those factors in determining whether to impose that penalty, *Booth* and *Gathers* will result in an anomalous and, we submit, inherently uncertain situation. Although the prosecution will be prohibited from adding to the information before a jury or commenting on it, the jury will be left, unguided by argument or instructions from the court, to place whatever weight it chooses on victim impact information that reaches it during trial.

More fundamentally, *Booth* and *Gathers* substantially interfere with the traditional responsibility of legislatures to determine which factors shall be relevant in imposing criminal sentences. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958). As we have noted, both Congress and many state legislatures have in recent years enacted legislation recognizing and protecting the rights of victims of crime. *Booth* is not only inconsistent with the significant body of victim rights legislation that has emerged in recent years, but it forecloses the opportunity for further development of community values through additional legislation on that subject. In view of its doctrinal weakness and its interference with the considered judgment of democratic institutions with respect to sentencing, *Booth* and *Gathers* should not stand.

III. THE VICTIM IMPACT EVIDENCE AND ARGUMENT AT ISSUE IN THIS CASE DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AMENDMENT

The only evidence of the impact of petitioner's offenses introduced during the sentencing phase of petitioner's trial was Nicholas's grandmother's description—in response to a single question—of the child's reaction to the murder. That testimony was an objective description of Nicholas's conduct, justifying an inference that the murder had had a severe impact on him. The testi-

mony was moving, because it conveyed Nicholas's difficulty in coming to terms with the irrevocable loss of his mother and sister, but it was not inflammatory in tone or content. Accordingly, absent a strict prohibition against victim evidence, the admission of evidence of Nicholas's emotional reaction to the murders would not violate any of petitioner's Eighth Amendment rights.

The State's closing argument during the sentencing phase could be said to violate *Booth* and *Gathers* in three respects. First, the State highlighted the future effect of the murders on Nicholas, calling the jury's attention to "what Nicholas Christopher will carry in his mind forever" (J.A. 13; see J.A. 15) and the implications of his having to grow up without his mother and sister (J.A. 15-16). Second, the State reminded the jury of the lost opportunities resulting from the murder, saying that Lacie "never had a chance to grow up" and that "there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anyone to take her to her high school prom" (J.A. 14). Finally, the State observed, in response to defense evidence suggesting that petitioner had led an exemplary life, that Nicholas's mother and sister, had also led "exemplary lives" (J.A. 17).[15]

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[15] Two aspects of the prosecution's argument that petitioner challenges do not, in our view, present any issue under *Booth* or *Gathers*. The prosecutor's suggestion that the jury would "provide the answer" to questions Nicholas would later have about "what type of justice was done" and "what happened" (J.A. 12) did not entail any argument for the death penalty based upon the harm to victims or the characteristics of the deceased. Further, it was not the equivalent, as petitioner suggests, of relying on comments by surviving family members as to the punishment appropriate for a given offense. Similarly, the prosecution's use of the murder weapon during rebuttal argument does not raise any issue of victim impact evidence or argument, and in fact presents no substantial issue of federal constitutional law. See, *e.g.*, *Darden* v. *Wainwright*, 477 U.S. 168, 178-184 (1986).

Those comments could not have rendered petitioner's sentencing hearing unfair or unreliable. The comments contained no suggestion that the jury should impose the death penalty on the basis of an arbitrary or unconstitutional consideration, such as race, political affiliation or religious belief. In large measure, the comments were responsive to a theme petitioner had advanced in his evidentiary presentation and argument, and neither the evidence itself nor the prosecutor's comments on it were unduly inflammatory. There is therefore nothing in the record of this case and the principles of the Eighth Amendment that would justify requiring the State to provide petitioner a new sentencing hearing.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted.

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